United Enviro Systems, Inc. *and* Bradley Garie, William Rathgeb, and Gregory Von Ohlen. Case 22–CA–16290

February 26, 1997

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, FOX, AND HIGGINS

On February 27, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it ordered the Respondent, inter alia, to make three discriminatees whole for any loss of earnings they suffered by reason of the Respondent's discrimination against them. On February 14, 1992, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order.[2]

A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Acting Regional Director for Region 22 issued a compliance specification and notice of hearing on August 25, 1993, and an erratum on August 26, 1993, alleging the amounts of backpay due. The Respondent filed an answer. Thereafter, the Acting General Counsel filed with the Board a Motion for Partial Summary Judgment, with exhibits attached, contending that certain portions of the Respondent's answer were not in compliance with the Board's Rules and Regulations and moving that the Board deem those portions that were not properly denied to be admitted as true.

On September 15, 1994, the Board issued a Supplemental Decision and Order Remanding that granted the General Counsel's Motion for Partial Summary Judgment only with respect to the allegations in paragraphs 1 through 4 of the compliance specification, and that denied the General Counsel's motion in other respects.[3] The Board remanded the proceeding to the Regional Director for Region 22 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge on paragraphs 5 through 10 of the compliance specification. A hearing was held before Administrative Law Judge Joel P. Biblowitz on February 1, 1995.

On April 17, 1995, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the record and the attached supplemental decision in light of the exceptions and briefs and, for the reasons stated below, has decided to affirm the judge's rulings, findings, and conclusions as modified below.

The General Counsel excepts to the judge's deduction from net backpay of certain profit-sharing amounts received by discriminatee Gregory Von Ohlen on his separation from his interim employer. In addition, discriminatee Bradley Garie was informed shortly before the hearing that he could roll over certain pension fund amounts from his interim employer's pension plan into an individual Section 401(k) retirement plan on his separation from his interim employer, and the General Counsel excepts to the judge's deduction of those amounts from Garie's net backpay. With the modifications explained below regarding the amount to be deducted, we agree with the judge that Von Ohlen's profit-sharing payment and Garie's pension plan distribution were properly deducted from net backpay.

In excepting, the General Counsel cites Section 10535.3 of the Board's Casehandling Manual[4] which states, inter alia, that "[d]iscriminatees should generally be made whole for lost contributions to pension funds or retirement plans" and that "[r]etirement benefits are not offset by interim wage earnings. Equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits." The General Counsel then argues that, based on this section, the Respondent bears the burden of proving that the "status of Garie and Von Ohlen, as a result of contributions to reciprocal pension funds made on their behalf during the backpay period, were reciprocal to those provided by Respondent's plan" and that the Respondent has not carried that burden because no evidence of reciprocity exists. We find the General Counsel's reliance on this section of the Casehandling Manual misplaced.

It is clear that the judge's decision takes account of the appropriate amounts of pension and profit-sharing due the discriminatees from the Respondent's own pension and profit-sharing plans. Hence, consistent with the manual's provisions, contributions by the discriminatees' interim employers were not offset against the Respondent's gross liability to make contributions to its own funds on the employees' behalf.

[1] 301 NLRB 942.
[2] 958 F.2d 364.
[3] 314 NLRB 1130.
[4] The manual provides guidance to Agency staff; it is not authority and is not binding.

Further, while the manual indicates that "contributions" should not be offset unless they are equivalent, we deal here not with contributions but with payments or distributions to the discriminatees. Indeed, Von Ohlen received a check for the profit-sharing amount due him. We find that this payment essentially is "wages" from the interim employer and hence deductible from net backpay. Likewise, Garie was presented the option of receiving his pension fund moneys directly or rolling over that amount. In either event, he had the immediate opportunity to receive the money subject to circumstances we take into account below. In sum, we hold that the following amounts are proper deductions from net backpay: (1) payments from an interim employer's profit-sharing plan that a discriminatee, on termination of that interim employment, has received in cash; and (2) distributions from an interim employer's pension plan that a discriminatee, on termination of that interim employment, has the option of either receiving directly in cash or rolling over into a Section 401(k) plan.

Thus, we agree with the judge's conclusions except that he erred in deducting from backpay all of the payments that discriminatees Garie and Von Ohlen collected from their interim employers' benefit plans on terminating their employment with those employers. Garie began working for Spartan Oil Company about August 1990 and he recalled ending his employment there in December 1994. After Garie left Spartan Oil, the Company notified him about a week before the hearing that he could roll over a distribution of about $2400 from its pension plan into a Section 401(k) retirement plan. Von Ohlen began working for Enroserv of Long Island, Inc. about June 1, 1989, and continued working for that Company and its affiliates until, as he remembered, some time in 1994. Von Ohlen received a check for $1500 from Enroserv's profit-sharing plan on his departure.

Although we adopt the judge's finding that the discriminatees' backpay should take into account these payments, we stress that the backpay period for the discriminatees ended on August 21, 1992, and that Garie's and Von Ohlen's interim employment with Spartan Oil and Enroserv, respectively, apparently extended into 1994. Thus, the payments that Garie and Von Ohlen received from these employers were at least to some extent attributable to moneys they earned outside the backpay period. We therefore shall deduct from their backpay only the amount of Garie's pension proceeds and Von Ohlen's profit-sharing payments that were accrued during the backpay period, which ended on August 21, 1992.

Additionally, regarding the pension fund distribution to Garie, the record does not show whether Garie, while working for Spartan Oil, made any contributions to that pension fund from his own earnings. We do not want to penalize Garie by including the identical sums twice in his interim earnings. We, therefore, shall reduce the applicable amount, if any, of Garie's pension proceeds to be deducted from his backpay by those contributions that Garie himself paid into Spartan Oil's pension fund and that are presently included as wages in Garie's interim earnings. Further, because Garie learned of the pension distribution only a week before the hearing, it is unclear whether he received the distribution in cash or whether he rolled over the full amount into a tax-deferred retirement account. If Garie received any of the funds in cash and paid a tax penalty for early withdrawal of moneys set aside for retirement, we shall further reduce the backpay deduction for Garie's pension fund distributions by any tax penalty he paid for early withdrawal of retirement benefits.[5]

Accordingly, we direct the Region's compliance officials to obtain, if possible, the necessary information from Spartan Oil, Enroserv, and Garie to make these calculations and to modify accordingly the backpay figures for each discriminatee listed below.

ORDER

The National Labor Relations Board orders that the Respondent, United Enviro Systems, Inc., Flanders, New Jersey, its officers, agents, successors, and assigns, shall make whole the following claimants by paying each the amount opposite his name, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

	Net Backpay[6]
Bradley Garie	$37,946.90

[5] To reduce the backpay deduction by the amount of any tax penalty is not to make Garie more than whole. As stated above, the reason we are treating Garie's pension proceeds as a deduction from net backpay is that Garie had the right to receive a cash payment. The amount that Garie must forfeit on election of a cash payout, however, cannot logically or equitably be considered to have been received by him.

[6] As stated, Von Ohlen's and Garie's backpay shall be reduced by that portion, if any, of the profit-sharing proceeds that Von Ohlen earned at Enroserv and the pension payments that Garie received from Spartan Oil which, as determined following a further compliance investigation, were accrued during the backpay period, providing also that Garie's backpay deduction will be reduced by any tax penalty he paid for early withdrawal of retirement funds and by any contributions he made directly from his earnings into Spartan Oil's retirement plan that are presently included in his interim earnings.

William Rathgeb	14,276.25
Gregory Von Ohlen	15,465.57[7]

[7] We have included in Von Ohlen's backpay the sum of $1,160.06 from the Respondent's profit-sharing plan that the judge inadvertently failed to add to this discriminatee's "net backpay" total.

Steven J. Holroyd, Esq., for the General Counsel.
Robert M. McCaffery, Esq. (Leib, Kraus, Grispin & Roth), for the Respondent.
Bradley Garie, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This supplemental hearing was heard by me on February 1, 1995, in Newark, New Jersey. The compliance specification, which issued on August 25, 1993, after being amended alleges that the following amounts are due to the discriminatees from United Enviro Systems, Inc. (Respondent):

Bradley Garie	$37,946.90
William Rathgeb	14,259.19
Gregory Von Ohlen	15,468.57

The Facts

In the underlying case, the judge and the Board (at 301 NLRB 942) found that Respondent fired Bradley Garie, William Rathgeb, and Gregory Von Ohlen on March 23, 1989,[1] because of their protected concerted activities in violation of Section 8(a)(1) of the Act, and ordered reinstatement and that they be made whole for their losses. The Board Order was enforced by a judgment of the United States Court of Appeals for the Third Circuit on February 14, 1992.

The Backpay Period

The compliance specification alleges that the backpay period for each of the discriminatees begins on March 23 and ends on August 21, 1992. Shortly after receiving Respondent's answer, the Regional Office advised Respondent that this answer was deficient and that the Region would move for partial summary judgment if a proper answer was not filed. Respondent failed to file a timely amended answer, and on January 18, 1994, the Region moved for partial summary judgment. By Supplemental Decision and Order dated September 15, 1994, the Board found Respondent's answer insufficient to raise any litigable issue regarding the allegations contained in paragraphs 1 through 4 of the compliance specification and granted the General Counsel's Motion for Partial Summary Judgment in that regard. It, therefore, is found that the backpay period for each of the discriminatees begins on March 23 and ends on August 21, 1992.

[1] Unless indicated otherwise, all dates referred to here relate to the year 1989.

The Formula to be Used

Because the Board's Order granting partial summary judgment applies to this issue as well, the Board's allegations are deemed to be admitted:

> (d) . . . an appropriate method for calculating the backpay due to the three discriminatees for the period beginning with the 3rd quarter of 1989 until the end of the backpay period is to calculate their individual percentage of total payroll during 1988, the first full calendar year prior to their discharges, and to project that they would receive this same percentage of sales payroll during this part of the backpay period, i.e. from July 1, 1989 to August 21, 1992.
>
> 3. The formula in 2(d) above was not used for the first two quarters of the backpay period because initially, the discharges significantly decreased the total payroll as the discriminatees were not immediately replaced. Accordingly, appropriate formulas for gross backpay due for these quarters are as follows:
>
> (a) The discriminatees are entitled to one week plus one day of backpay for the first quarter of 1989 for the period from March 24, 1989 to March 31, 1989. Backpay for that period was calculated by giving each discriminatee one week plus one day of their base weekly pay at the time of their discharge, plus the average amount of commissions earned in that quarter prorated for one week and one day.
>
> (b) The appropriate measure of the backpay for the second quarter of the backpay period is the amount of salary and commission actually earned during the previous quarter, plus the amount estimated in paragraph 3(a) above, to represent the week and one day following the discharge, to account for a full quarter. This full quarter of earnings from the previous quarter was used as the backpay for the 2nd quarter 1989.
>
> 4(a) Beginning with Q3, 1989, the formula noted above in 2(d) was used. This formula calculates for each discriminatee their established percent of the Respondent's payroll in the first full pre-discharge calendar year (1988), and projects that this percent of payroll would continue forward throughout the backpay period.

On the basis of these formulas, pursuant to the Board's Order granting partial summary judgment, the gross backpay is found to be as follows:

Period/Qtr.	*Garie*	*Rathgeb*	*Von Ohlen*
1989/1st.	$1,002.32	$9,18.40	$611.57
1989/2d	11,995.34	10,913.75	8,036.87
1989/3d	6,186.16	5,012.48	4,307.76
1989/4th	14,190.09	11,497.86	9,881.34
1990/1st.	10,920.27	8,848.40	7,664.38
1990/2d	10,594.63	8,584.85	7,377.62
1990/3d	10,594.63	8,584.85	7,377.62
1990/4th	10,594.63	8,584.85	7,377.62
1991/1st.	10,516.18	8,520.98	7,322.90
1991/2d	11,945.07	9,678.77	8,318.00

Period/Qtr.	*Garie*	*Rathgeb*	*Von Ohlen*
1991/3d	7,964.31	6,453.27	5,545.98
1991/4th	10,100.07	8,183.82	7,033.23
1992/1st.	7,033.29	5,698.99	4,897.66
1992/2d	5,385.38	4,363.63	3,750.13
1992/3d	4,936.00	3,999.51	3,437.20

Net Interim Earnings

Pursuant to the Board's Order of September 15, 1994, the only subject to be litigated here is net interim earnings, and its many components. Some of those issues present here are search for work, commuting expenses for Von Ohlen, medical and dental expenses, and pension and profit-sharing plans.

The Searches for Work

As stated above, all three discriminatees were discharged by Respondent on March 23. Garie testified that he obtained a job with Cecos in May at approximately $31,000 a year. He left that job voluntarily in about August because of the lack of medical coverage and to seek a better opportunity, and began working a few days later for Enviro Sciences, at a salary of about $33,000 a year. He left his employ at Enviro Sciences in about March 1990 because of health and safety concerns on the job and began working immediately for York Laboratories at a salary of about $35,000 a year. He was terminated without prior notice by York in about June, when they told him that they could tell that he was not happy at the job and that he "just didn't fit in with the company." Garie testified that this termination was "very friendly," and he was given 2 weeks' severance pay. He began working for Spartan Oil Company in about August 1990; although he could not recollect his salary at Spartan, he was earning more than he had earned at York. He remained at Spartan through the end of the backpay period.

Rathgeb's first and only job during the backpay period was with the Oldover Corporation as a sales representative. He began working there in about June and was paid about $38,000 a year, about the same salary he was paid when he was discharged by Respondent, and he remained there through the end of the backpay period.

Von Ohlen began working for Stout Environmental Company (or Enroserv of Long Island, Inc., as it is named in the compliance specification) on about June 1 and remained with that company and Chemical Management, a different department of the same company, throughout the backpay period. He began at $24,000 a year, slightly less than he had been earning when he was terminated by Respondent.

Pursuant to the Board's Order granting partial summary judgment here, the gross backpay here has been deemed to be admitted. Therefore, Respondent has the burden to establish affirmative defenses that would mitigate its liability. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Respondent has the burden of establishing such matters as unavailability of jobs, willful loss of earnings, and interim earnings to be deducted from backpay. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

Respondent has produced absolutely no evidence of an insufficient search for work by the discriminatees. In fact, all three obtained employment within 2 to 3 months at fairly comparable salaries. Counsel for Respondent cross-examined Garie about his termination from York and indicated that he might argue that his backpay ended on that termination. Backpay continues even after a discriminatee has been discharge by an interim employer unless the discharge was caused by willful conduct on his part. *Gary Aircraft Corp.*, 233 NLRB 554, 558 (1977); and *Sylvan Manor Health Care Center*, 270 NLRB 72, 75 (1984). The evidence establishes that Garie's termination by York was an amicable one. I, therefore, find that Garie, Rathgeb, and Von Ohlen made proper and adequate searches for interim employment and that the backpay period for each extends to August 21, 1992, as alleged in the compliance specification.

Von Ohlen's Commuting Expenses

The compliance specification alleges that Von Ohlen is entitled to $4565 in commuting expenses for the second, third, and fourth quarter of 1989, and that this amount is to be deducted from his interim earnings prior to deducting interim earnings from gross backpay. The basis of this allegation is that when Von Ohlen obtained employment at Enroserve, which is located in Farmingdale and Long Island, New York, he was obligated to travel approximately 50 miles each way to work every day, and counsel for the General Counsel alleges that this mileage, at 24 cents a mile, plus $13 in daily toll expenses, should be deducted from his interim earnings. Von Ohlen testified that prior to his termination by Respondent he lived in Flanders, New Jersey, 2 miles from Respondent's facility. On being terminated by Respondent, he moved to his father's house in River Edge, New Jersey. From about June 1, when he began working for Enroserve, until about 6 months later when he moved to Long Island, he drove 100 miles round trip each day to work and incurred $13 a day in tolls. He could not recall whether he ever requested reimbursement for mileage expenses while employed by Respondent. Phyllis Leuzarder, vice president and secretary treasurer of Respondent, testified that Respondent terminated Von Ohlen in February 1987 and, as a condition of his reinstatement, he was assigned to service Respondent's customers in Long Island from his River Edge residence. She testified further that after February 1987, Von Ohlen submitted expense statements for reimbursement to Respondent for travel from River Edge to Long Island, but she did not have these expense reimbursement statements with her at the hearing:

> I don't have them available with me today. My office manager is out on maternity leave, and it is going to take me at least another day or two to try and get into the archives to find the files.

As stated above, it is Respondent's burden to establish any deductions from gross backpay. The compliance specification issued here on August 25, 1993. Respondent had 18 months to collect evidence and prepare its witnesses for the hearing. When a witness comes to the hearing and testifies that he/she needs another day or two to obtain evidence to diminish a

discriminatee's backpay, the answer is simply, "[I]t's too late." I, therefore, find that Respondent has not satisfied its burden of establishing that Von Ohlen was not entitled to commuting expenses for 6 months beginning on about June 1.

Medical Expenses

The compliance specification alleges that each of the discriminatees was entitled to be reimbursed for medical expenses during the backpay period. Susan Schwartz, who is employed as an examiner for the Board, and who prepared the compliance specification here, testified that when employees are covered by medical or dental insurance coverage prior to being discharged (as were the discriminatees), and if at points of the backpay period they are not covered by such plans and they have out-of-pocket expenses for medical or dental bills or additional costs for coverage (as did the discriminatees here), then they would be entitled to reimbursement from their employer (the Respondent here). At the time that the discriminatees were terminated, Respondent had a medical insurance plan as well as a dental plan, and the discriminatees participated in these plans.[2] Schwartz testified that in preparing the compliance specification, she only included medical, dental, or prescription bills that would have been covered by Respondent's plans, and were not paid by any of the plans at the discriminatees' subsequent employers.

While employed at Respondent, Garie had family coverage, with a $400 deductible, for which he paid $20 a week and had a $400 deductible. Garie testified that he met the deductible on Respondent's medical plan for 1989. He was not covered for medical or dental coverage in his employment at Cecos, because it had a 3-month waiting period before the coverage was effective and he left before it took effect. Health insurance coverage began immediately after he was hired by Enviro Services in August, but he incurred medical, dental, and prescription bills during the prior 5-month period. There was a $400 a year deductible at Enviro Services, which he met in 1989, but had no premium to pay. After leaving Enviro Sciences in about March 1990, he was not covered for medical insurance at his next employer, York, because they had a 3-month waiting period for coverage, and he was employed there for less than 3 months. Although he began his employ with Spartan in August 1990, his health insurance there did not become effective until January 1, 1991. He incurred medical, dental, and prescription bills between March 1990, when he left Enviro Services, and January 1, 1991, when his coverage at Spartan took effect. Garie identified the bills that he incurred during these two periods, and these were the bills that Schwartz used in preparing the compliance specification.

Rathgeb, like Garie, had family coverage while employed by Respondent and met the deductible in 1989. He began working for Oldover on June 13, but had to wait a mandatory 3 months before being covered by their health insurance coverage. There are three categories of medical bills for which the General Counsel seeks reimbursement for Rathgeb: all bills incurred between March 23 and September, when his medical insurance at Oldover took effect, bills related to his wife's pregnancy, which were considered a "preexisting condition" and were not covered by Oldover, but would have been covered under Respondent's plan, and all dental bills up to $1500 a year (the maximum allowable under Respondent's plan) as Oldover's plan did not cover dental bills.

Von Ohlen did not have to pay for his single coverage while employed by Respondent; he did have to pay about $40 a week for similar coverage at Enroserve. Von Ohlen incurred no medical bills during the backpay period and the compliance specification only lists $2,400.14, the amount that Von Ohlen paid for his single coverage, as he would not have had to pay for this coverage at Respondent. Respondent appears to allege that because Von Ohlen's interim earnings exceeded his gross backpay during most of the backpay period, these expenses should have been deducted from interim earnings rather than being added on afterward. This argument is without merit. If Respondent had not unlawfully discharged Von Ohlen, he would not have had to pay for medical insurance. Even if he did earn more at Enroserve for certain quarters than he would have earned at Respondent, the additional medical cost that he incurred was an out-of-pocket expense caused by Respondent's action, and Respondent is obligated to reimburse him for this expense.

When an employer has been found to unlawfully discharge employees the traditional remedy is for the employer to make the employees whole for the loss that they suffered due to the discrimination. This loss is not limited to wages, but to all other terms and conditions that the employees enjoyed prior to the discrimination, but were not able to immediately duplicate after being terminated. Out-of-pocket medical expenses, such as those incurred by Garie and Rathgeb, and the additional cost of obtaining coverage (paying for single coverage at an interim employer when such payments were not required with Respondent) such as were incurred by Von Ohlen, are clearly part of a make-whole remedy. *G. Zaffino & Sons*, 289 NLRB 571 (1988); and *Hansen Bros. Enterprises*, 313 NLRB 599 (1994). As Schwartz, Garie, Rathgeb, and Von Ohlen identified these additional medical expenses, and as Respondent introduced no evidence that would negate or mitigate its liability, I find that Respondent is liable for the medical expenses as set forth in the compliance specification.

Pension and Profit Sharing

This issue arose with Garie and Von Ohlen. Schwartz testified that in determining the amount due to Garie and Von Ohlen under Respondent's pension and profit-sharing plan, she took the account balance and the effective starting dates from the statements that they received from Respondent and assumed the termination date of their participation to be August 21, 1992, the end of the backpay period. She made no adjustments to these account balances, and using the provisions of the plan, she determined the amount owed. Garie's final profit-sharing statement from Respondent stated that his account balance was $6569 and that his effective starting date under the plan was January 1, 1987. The statement also provides that employees with between 5 and 6 years of service have an 80 percent vesting percentage. Considering August 21, 1992, as the end of his employment would have given him between 5 and 6 years' employment with Respondent. Eighty percent of $6569, plus $315.31 in interest

[2] Actually, Respondent instituted a different medical and dental plan in February 1992 that was in effect through the end of the backpay period.

totals $5,570.51 due for profit sharing. Von Ohlen's final statement states that his account balance was $1824 and that his effective starting date under the profit-sharing plan was January 1, 1988. Four and a half years of assumed service would give him a 60-percent vesting percentage, plus $65.66 in interest, which equals $1,160.06 owed to him for profit sharing.

Respondent concedes that had Garie's employment continued throughout the backpay period, his pension would have vested at 80 percent. Based on this vesting, Schwartz computed his pension owed as $2,812.82, including interest. No pension is alleged to be owed to Rathgeb or Von Ohlen. Respondent alleges that some payments received by Garie and Von Ohlen from interim employers, after they left their interim employment, should be used as a set off against net backpay. In this regard, Garie testified that about a week prior to the hearing here, he was notified by Spartan that he could rollover an amount of about $2400 from its pension plan into a Section 401(K) plan. Von Ohlen testified that after ending his employment at Enroserve, he received a check from them in an amount of $1500 under its profit-sharing plan. The General Counsel alleges that these post employment amounts that Garie and Von Ohlen received should not be deducted from their net backpay because they were not exactly equivalent to what they lost through Respondent's unlawful actions.

The purpose of a backpay hearing is to make discriminatees whole for any loss that they suffered as a result of unlawful discrimination against them. Although the burdens are on respondents in these proceedings, a judge should not lose sight of the obvious in coming to conclusions in these matters. Although I could find no case on point, it appears clear to me that if pension payments and profit-sharing payments due, but not yet paid, are to be added to a respondent's liability, pension, and profit-sharing payments paid to the discriminatees by an interim employer should be deducted from the respondent's liability. I fail to comprehend the reasoning behind the General Counsel's position that such amounts could only be an offset to respondent's liability if the payments were made pursuant to an identical plan. I, therefore, find that the $2400 payment that Garie received from Spartan and the $1500 payment that Von Ohlen received from Enroserve, should be deducted from the net backpay due to them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, United Enviro Systems, Inc., Flanders, New Jersey, its officers, agents, successors, and assigns, shall pay the following amounts, plus interest, to Bradley Garie, William Rathgeb, and Gregory Von Ohlen; Respondent shall make the appropriate deductions from the amounts described as net backpay for any tax withholding required by state and Federal laws:

	Bradley Garie
Net Backpay	$28,269.47
Medical Expenses	1,294.10
Profit Sharing	5,570.51
Pension	2,812.82
Total	$37,946.90
Less	$2,400.00
Total due to Garie	$35,546.90
	William Rathgeb
Net Backpay	$11,608.75
Medical Expenses	2,667.50
Total due to Rathgeb	$14,276.25
	Gregory Von Ohlen
Net Backpay	[4]$11,905.37
Medical Expenses	2,400.14
Total	$14,305.51
Less	$1,500.00
Total due Von Ohlen	$12,805.51

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] This was calculated by deducting his commuting expenses in the second and fourth quarter of 1989 (there was a typographical error of $3 in his commuting expenses for the fourth quarter in appendix D2 as compared with appendix D4) from his interim earnings in those two quarters, and then deducting these amounts from his gross backpay in the first, second, and fourth quarters of 1989 (as his interim earnings substantially exceeded his gross backpay in the third quarter of that year).